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United States Supreme Court.

No. 847.

OCTOBER TERM, 1915.

WILLIAM N. McFARLAND,
Supervisor of Public Accounts of Louisiana, AND OTHERS,
Appellants,

versus

THE AMERICAN SUGAR REFINING COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA, FROM
DECREE GRANTING INJUNCTION.

BRIEF ON BEHALF OF THE AMERICAN SUGAR REFINING COMPANY, APPELLEE.

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SUPREME COURT OF THE UNITED STATES.

No. 847.

OCTOBER TERM, 1915.

WILLIAM N. MCFARLAND ET AL.,
Appellants,

vs.

THE AMERICAN SUGAR REFINING COMPANY,
Appellee.

BRIEF ON BEHALF OF THE AMERICAN SUGAR REFINING COMPANY, COMPLAINANT AND APPELLEE, ON APPEAL OF DEFENDANTS FROM A DECREE OF THE DISTRICT COURT GRANTING A TEMPORARY INJUNCTION PENDENTE LITE.

Statement of the Case.

The American Sugar Refining Company prayed in this Bill in Equity for an injunction, temporary and permanent, against the enforcement of Act No. 10 of the Extra Session of the General Assembly of Louisiana of 1915, upon the ground that the Act violates the Federal and State constitutions.

The Court, consisting of a Circuit Judge and two District Judges under the provisions of Section 266 of the Judicial Code, granted, after a full hearing, a temporary injunction *pendente lite*, and the defendants have taken this appeal from that decree.

The Statute.

The Act (Record, pp. 19–23) provides in substance as follows :

(SEC. 1) That the business of buying and refining sugar is, by its nature and by reason of its monopolization, impressed with a public interest ; and all sugar refineries now and hereafter operating in the State are public utilities.

While "all" refineries are thus denominated as public utilities, the Act in a later section proceeds to exempt many sugar refineries from its operations.

This exemption, however, is not, as incorrectly stated in appellants' brief, an exemption of all "those refiners who plant and grow their own cane, and refine the sugar produced by them." On the contrary, refiners who are also planters, but who produce less than half of the sugar refined by them are subject to the act (See Section 15 of Act, Record, p. 23).

The Act then provides in the next five sections for a minute system of inspection and regulation, which largely strips the business of its privacy, and treats it as a public utility.

Then follows the principal purpose of the Statute, for by Section 7 it is provided that if any refiner shall systematically pay a less price for sugar in Louisiana than he pays in any other State, he shall hereby create against himself a *prima facie* case of violating the criminal statutes of Louisiana, which forbid under penalties of fine and imprisonment any monopolization or restraints of trade.

A violation of this provision also subjects the offender to a fine of $500 per day and to a cancellation of its license.

If the offender be a domestic corporation, its business shall be liquidated; and if a foreign corporation, it shall be ousted and its property sold.

(SEC. 8) That any refinery kept closed for more than one year shall be presumed to have been closed for the purpose of violating the laws against monopolies, etc., and, unless such presumption be rebutted by evidence, the refinery shall be ordered sold; and if not sold within six months, a receiver must be appointed, who shall lease or sell within twelve months; and neither the defendant nor any one having a substantial interest therein may be the purchaser.

(SEC. 9) That if any refiner is charged with a violation of the Act or of any anti-trust law of the State, and shall be or has been made defendant in a suit by the State for forfeiture of charter or for ouster, he may be ruled into court at any stage of the proceedings to show cause why an injunction should not issue or a receiver be appointed, with power to operate his business. As the systematic purchase by such refiner of raw sugar in Louisiana at a less price than the said refiner has paid for such sugar in other markets, creates a *prima facie* case against him, this provision for an operating receiver before the refiner has had his full day in Court, obviously makes the confiscation of the property very easy.

(SEC. 10) That each day's violation of each of the provisions of the Act, and of each regulation made by the Inspector, shall be punished by a fine ranging from $50 to $2,500.

Such fine shall be recovered, and any provision of the Act enforced by the State through the Attorney General, or District Attorney under direction of the Governor or Attorney General.

(SEC. 11) That all "books, letters and other documents (or apparent copies thereof)," of a defendant shall be given full effect without special proof unless rebutted by the evidence.

The same effect shall be given to all reports of Legislative

and Congressional Committees, State and Federal bureaus, departments or commissions, and any record of any State or Federal Court in any legal proceeding to which defendant is or was a party, with reservation (when such record is offered) of the right to cross-examine any witness as to whom there was no opportunity to crossexamine ;

Then follows the important exempting clause, without which the statute could never have been passed, and which the counsel for the State admits was intended to restrict the operation of the statute, so far as possible, to one sugar refining company (the complainant). Section fifteen provides that "the business of refining sugar within the meaning of this Act is hereby defined to be that of any concern that buys and refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, *or that buys and refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it.*"

The Pleadings.

The Bill shows that the complainant is now, and has been since 1891, engaged in the business of sugar refining in Louisiana. The character of its business, extent of its property interests, etc., are detailed in the Bill (Record, pp. 2–4).

The answer in the return of the defendants to the rule to show cause (Record, p. 25) avers that "the complainant comes into court with unclean hands," and therefore has no standing in a court of equity.

This objection is sought to be supported by averments covering more than 56 pages of the record (pp. 25–81) charging many alleged prior offenses against the laws of Louisiana, of the United States and of good morals.

The answer to the averments of the Bill denies the conclusions of law set up by complainant as the basis of the relief claimed, but admits the only

essential substantive facts, namely, (1) that complainant is within the jurisdiction of the State of Louisiana, and (2) that it is a sugar refiner which buys all the sugar which it refines and is, therefore, engaged in the "business of refining sugar" within the meaning of Act No. 10.

Some issues of fact are tendered by the answer, but all such will be found to be irrelevant to the issues tendered by the Bill, which, if sound, entitle complainant to the relief prayed without regard to the truth or falsity of the extraneous facts so alleged by the defendants. The case, therefore, is practically to be treated as if presented on a general demurrer of defendants to the complainant's Bill.

There was no need, therefore, of supporting affidavits. Moreover, under Equity Rule 31, no reply was required and all new and affirmative matter in the answer is deemed to be denied by complainant.

The constitutionality of the statute was elaborately discussed in the Court below in oral argument and lengthy briefs and the three Judges reached the unanimous conclusion that the statute was void as it violated the express prohibition of the Fourteenth Amendment.

ARGUMENT.

The objection that complainant comes into Court with "unclean hands," and is thereby barred from asking relief from the enforcement of an unconstitutional statute, is novel and unsound.

It is difficult, if not impossible, to conceive how a complainant, who only asks the protection of a court of equity against the enforcement of an invalid law, can possibly have "unclean hands" with reference to the assertion of his constitutional rights, because of alleged past crimes, misdemeanors or immoralities, which are merely charged and neither proved nor admitted.

In discussing this question, it should be said in limine that although the American Sugar Refining Company has been continuously in operation in Louisiana since 1891, it has never been convicted under the laws of that State of any offense whatever.

We are prompted to make this remark because of the disingenuous suggestion contained in the appellants' supplemental brief on page 6. The appellants there quote from a recent decision of the Supreme Court of Louisiana in the case of State vs. American Sugar Refining Company, and as quoted without explanation it gives the impression that that Court had adjudged that the American Sugar Refining Company had persistently violated "the public policy of the State by a monopoly of the sugar trade and industry" and that it had "oppressed" and was "still oppressing" the people of the State.

No such judgment has been pronounced by the Supreme Court of the State. While the language from the decision is correctly quoted, the Supreme Court of Louisiana, on a demurrer to the State's petition, simply held that the allegations of such petition stated a good cause of action. and thereupon the case was remanded to the Court below to try the issues of fact.

The apparent attempt in the appellants' brief to convey the impression that either the Supreme Court of Louisiana or any Court of that State has adjudged that the American Sugar Refining Company has violated any of its laws is without any justification in fact.

There are other misleading statements in appellants' brief, to which we refrain from reference only in the interests of brevity, but it is unfortunate that the appellants, by the omission of dates, in their brief create the impression that events, which happened many years ago, are recent in occurrence.

We may also call attention to the fact that the letters, upon which appellants chiefly rely to justify their many charges,

were many of them written between 1892 and 1904, and that the latest of them is dated 1908.

The appellants therefore contend that a Court of equity should grant no relief to the appellee from the enforcement of an unconstitutional statute simply because of alleged transactions, which happened many years before the enactment of the invalid law in question, and this notwithstanding the fact that the appellee does not seek the aid of a Court of equity with reference to any of the alleged transactions.

The rule is old and well settled. A court of equity will not grant equitable relief save to those who do equity; hence, if complainant shows want of equity in its acts or dealings *with reference to the subject-matter as to which he asks the relief*, that court will remit him to his remedy at law.

The rule has been thus stated in *Liverpool & London & Globe Ins. Co. vs. Clunie*, 88 Fed. Rep., 160, 170, where the Court say (italics ours):

> "The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity, which deprives a suitor of a right to justice in a court of equity, is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct *in the particular matter or transaction in respect to which judicial protection or redress is sought.* Woodward vs. Woodward, 41 N. J. Eq., 224, 4 Atl., 424; 1 Pom. Eq. Jur., 399."

To the same purport may also be cited:

1 Pomeroy's Equity Jurisprudence, Secs. 397, 399.

Shaver vs. Heller & Merz Co., 108 Fed. Rep., 821, 834.

Talbot vs. Independent Order of Owls, 220 Fed. Rep., 660, 662.

See also opinion of Court below (Record, p. 85).

It is patent that the illegal acts, alleged in the *ex parte* statement of appellants to have been committed by complainant, are not charged to have done with reference to the matter or transaction as to which complainant asks relief in its Bill. That matter or transaction is simply the threatened interference with complainant's constitutional rights under the color of an invalid statute.

An unconstitutional law is no law. It approaches the absurd seriously to contend that one possessing constitutional rights of liberty and property and equality before the law, may be estopped by alleged past conduct from opposing the enforcement of an invalid law and must suffer its enforcement against him with the consequent deprivation of constitutional rights. If so, there would be one constitution for the just and another for the unjust.

The appellants' contention, carried to its logical conclusion, is that if the complainant has been guilty in the past of any violations of law, it must not only pay the penalties specifically prescribed by law with reference to such violations, but that for all future time a court of equity must be closed to the complainant.

If this be so, then so far as concerns a court of equity and its remedial processes for preventing the enforcement against the complainant of an unconstitutional statute, the Constitution *for all time* is non-existent as to the complainant, although protecting all other classes of citizens. The statement of such a proposition is its own refutation.

The complainant asks nothing of the court that is not of common right to every citizen of the land and that does not enure to the benefit of every citizen, for the complainant simply seeks to vindicate the supremacy of the fundamental law over an invalid statute, and in so doing it is not simply protecting its constitutional rights but is also rendering a public service, for it has always been recognized in the class of cases, where the interposition of a court of equity is asked with refer-

ence to the unconstitutionality of a statute, that the ground of equity jurisdiction, as originally stated in the case of Smyth vs. Ames, 169 U. S., 466, 518, is not merely the fact that oppressive penalties operate as a virtual denial of justice and therefore can be regarded as a true cause of equity jurisdiction, but that such jurisdiction could be based upon the higher ground that the public interest was concerned, when the legislative and executive powers were violating the constitution of the United States in seeking to enforce an unconstitutional law.

This was recognized as far back as Smyth vs. Ames, 169 U. S., 466, although jurisdiction was there rested largely upon the ground of excessive penalties. In that case Mr. Justice HARLAN said, at page 518 (italics ours):

> "Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, *matters that affect not simply individuals but the interests of the entire community*, as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

In the case of *Ex Parte* Young, 209 U. S., 123, which definitely established this higher ground of jurisdiction, Mr. Justice PECKHAM said (pp. 164-5):

> "From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid. * * * All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question."

In the case of Cleveland vs. Cleveland City Ry. Company, 194 U. S., 517, Mr. Chief Justice WHITE said at page 531 (italics ours):

> "Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that in view of the controversies, confusion, risks and multiplicity of suits which would necessarily have been occasioned by the resistances of the complainant to the enforcement of the ordinance, *and in view of the public interests and the vast number of people to be affected*, the case was within the jurisdiction of a court of equity."

The most recent case on the subject is that of the Wadley Southern Railway Co. vs. Georgia, 235 U. S., 651. The question arose whether, if the court should enjoin the enforcement of a statute carrying oppressive penalties and at some subsequent date the statute was held to be constitutional, would the State then have a right to recover penalties existing in law even though they might not exist in equity and good conscience. The Supreme Court said at page 662:

> "These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the constitution penalties cannot be collected, if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders but depend upon a showing of extrinsic facts. A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality is in its nature somewhat akin to an *ex post facto* law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question."

The public policy of the nation has itself determined by statutory law how these questions shall be determined. Section 266 of the Federal Judicial Code recognizes the necessity of providing a method whereby the validity or invalidity of a law could be tested preliminarily without irreparable damage to business interests. This section provides (italics ours) :

> " It is further provided that if before final hearing of such application (the application for a preliminary injunction) a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of the State, to enforce such statute or order, *accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court*, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

Then it provides that such stay may be vacated if the State suit is not proceeding with due diligence.

What is the obvious import of such a provision ? It means that Congress has declared it as the public policy of the nation that actions of the class now before the Court shall be tried by three judges and that every corporation has the right to invoke the injunctive relief of the judicial branch of the government as to the unconstitutionality of the statute. It then provides that the United States court should yield precedence, if a suit were brought in the State Court to enforce such statute, *provided the State court granted a stay of proceedings under the statute pending the final determination of the suit.* Therefore, Congress intended that in any case, not plainly frivolous, there should be a stay until the determination of the question at issue had been reached by the orderly process of law through the judicial department of the government. If the State would grant a stay, the Federal court

should keep hands off, saving the right of ultimate appeal to the Supreme Court of the United States. If the State did not so act, the implication is irresistible and the rule almost mandatory that the Federal court shall grant an injunction until the case has reached such final hearing according to due process of law.

Is there in any of these cases and in the statutory rule of policy so recently enacted, any suggestion that a chancellor shall so far exercise an arbitrary moral censorship of any litigant, who has appealed to the court to stay the enforcement of an unconstitutional statute, as to inquire into its past morals or to hold that, if it had been a sinner in the past, it should be barred forever from the court and the Constitution be non-existent for it. If that were so, it would not only unreasonably punish the litigant but would defeat the public ends in the important respect referred to by Justices PECKHAM, HARLAN and Chief Justice WHITE, namely, *that it is to the public interest that the validity of a doubtful statute shall be determined before irreparable injury is done to property interests.*

The Bill (Par. XXI., Record, pp. 13, 14) is thus founded upon an established and well recognized ground of equity jurisdiction. The Louisiana Act No. 10, by its very terms, imposes the most harsh, unreasonable and confiscatory penalties upon any sugar refiner who may undertake to question the validity of the law in any other manner than that in which this complainant has attacked it. To take the chances of violating the letter of the Act and of suffering penalties which in the aggregate, even for a comparatively short while, might amount to nearly the value of the total property invested in the business, is the only alternative remedy, if such can be called a remedy.

The Act, in addition to ouster, imposes possible fines of twenty-five hundred dollars for each day's violation of each of the provisions of the Act and for each of the unknown and limitless future regulations which the Inspector of Sugar

Refining is authorized to make. Unless the validity of the Act can be determined in such a proceeding as this, it can probably never be determined at all, for the reason that no one subject to its terms would, in view of these destructive penalties, dare to contest the Act.

In such circumstances, equity lends its aid by way of injunction against the operation of the law and determines whether constitutional rights are invaded by such law, in order that the persons subjected to such unreasonable penalties may not be compelled to risk their all in making a test by a violation of the law.

It would expand this brief to inordinate length to discuss the cases cited on this point by the appellants Most of them are either State decisions or those of Federal District or Circuit Courts and examination of all of them will show that they are plainly distinguishable from the case at bar; this distinction is emphasized when the only decisions of this Court, cited by the appellant, are considered. These are

Wheeler vs. Sage, 1 Wallace, 518.
Bartell vs. Nutt, 4 Peters, 184.
DeWeese vs. Reinhart, 165 U. S., 386.

In the first of these cases (Wheeler vs. Sage), several partners were engaged in a scheme to defraud and one of the partners attempted to take an unfair advantage of his associates. This Court naturally declined to interfere.

In the second case (Bartell vs. Nutt) an alleged partner attempted to make his associates account to him for one-half of the loss sustained by an unsuccessful and fraudulent attempt to impose spurious vouchers on the Government. Here again this Court naturally held that a Court of equity would not lend itself to assist either of the parties to a crime.

In the third case (DeWeese vs. Reinhart) the plaintiff attempted to profit by his own reprehensible conduct in attempting to secure by a mistake in a land grant certain home-

stead rights, to which he was not entitled. Again this Court declined to lend the remedial aid of a chancellor to this attempt.

In all three cases it will be observed that the transaction as to which a Court of equity refused relief to a party who sought to invoke its remedial powers was one which the Court regarded as against good morals.

FIRST.

THE STATUTE VIOLATES ARTICLE 2 OF THE CONSTITUTION OF THE STATE OF LOUISIANA OF 1913 AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT BASES THE REGULATION OF THE BUSINESS OF REFINING SUGAR, WHICH IS PURELY PRIVATE, UPON THE FALSE ASSUMPTION THAT SUGAR REFINERIES ARE PUBLIC UTILITIES AND THAT THE BUSINESS OF REFINING SUGAR IS AFFECTED WITH A PUBLIC INTEREST, WHICH ALONE CAN WARRANT REGULATION.

This objection to the Act is based upon the principle that a business is not subject to special governmental "regulation" unless it be affected with a "public interest," and that no such interest exists in sugar refineries or other purely private manufacturing enterprises.

In the discussion of this novel and important question, we trust that the court will recognize the fact that in using the word "regulation" we do not refer to general police regulations, such as the State may impose upon all citizens and corporations under the ordinary police powers, but only such

"regulation", in the narrower or more technical sense of the term, as the State imposes upon a peculiar kind of business enterprises, which are regarded as no longer private but quasi-governmental in character. The complainant can be prevented from selling unwholesome sugar, from risking the lives of its employees, or from doing anything which concerns the peace, safety or morals of the people within the province of police regulation, provided that such prohibition operates on all of a given natural class alike. A law cannot require the American Sugar Refinery to erect fire escapes of a given character and not require others in the same situation to do the same. Police regulations must be uniform, and as long as they are uniform and not arbitrary they are valid, for complainant does not make any pretense that it is beyond the police powers of the legislature. But when we speak of "regulation" in a narrower sense, we mean the power of the State to take from private business its elements of privacy, its liberty of action, and say to it that, within certain limits, the State has an "interest" in the property, and therefore may subject it to a degree of regulation wholly inconsistent with ordinary manufacturing enterprises.

I.

THE TEST OF THE LEGALITY OF LEGISLATIVE REGULATION IS WHETHER THE BUSINESS SOUGHT TO BE REGULATED IS AFFECTED WITH A PUBLIC INTEREST OR IS ESSENTIALLY PRIVATE. THE LEGISLATIVE DECLARATION IS NOT FINAL; THE QUESTION IS ONE OF LAW FOR THE COURTS.

The bare fact that the Legislature has assumed to regulate a particular business does not carry with it the conclusion of the legality of the regulations; were it otherwise, there would be no enforceable constitutional limit to the power of the Legislature; whatever it might say would be conclusive.

The courts, therefore, are not merely empowered, but required—and the jurisprudence to that effect is uniform—to examine the legislative provisions for regulation and to determine whether the business sought to be regulated is one which can be so regulated; in other words, whether the Legislature had the constitutional power to make such regulations. From the case of Munn vs. Illinois, 94 U. S., 113 (decided in 1876), to the present time, this Court has never questioned its own power and duty to examine every regulation, which interferes with property rights, and determine *as a judicial question* whether it is an unreasonable and oppressive interference with such rights.

This principle is essential to the protection of the rights of liberty and property guaranteed by the Federal and State constitutions. If any citation of authorities is necessary to support so fundamental a principle, judicial expression to such effect will be found in the cases hereinafter cited.

II.

SUGAR REFINERIES ARE NOT PUBLIC UTILITIES; THE BUSINESS OF REFINING SUGAR IS NOT AFFECTED WITH A PUBLIC INTEREST.

Act No. 10 declares (Sec. 1, Record, p. 19):

> "That the business of *refining* sugar in the State of Louisiana is hereby recognized and declared to be impressed with a public interest by reason of the nature and by reason of the monopolization thereof; and the sugar refineries now and hereafter operating in the State, in the business of buying raw sugar and manufacturing refined sugar and in the business of manufacturing refined sugar whether the raw sugar is bought or otherwise handled are hereby declared to be public utilities."

The business of refining sugar, involves first the purchase of raw sugars, and of the materials and supplies necessary for

the processes of refining; next the conversion of the raw sugar into the refined products; and lastly the distribution and sale of the refined products.

The public have no "interest" in the business in the special sense which makes it no longer a matter *juris privati.* It is most persuasive that at no time, since the industry was first started, has any State ever declared that the business was affected with a public interest or attempted to regulate it as such.

Is the buying of the raw sugar affected with a public interest? Clearly not, because the Act purports to regulate the business of sugar *refiners* only, and if the sugar buying is the element in which the public have an interest, the Act, to be valid as a regulation, must apply to all sugar buyers, which it does not pretend to do.

The buying of raw sugar is but a preliminary step in the refiner's business. The business is not that of buying raw sugar, but of manufacturing and selling refined sugar. A shoe manufacturer would not be properly designated as being in the business of buying leather; his business is the manufacturing of shoes.

The process of refining is not affected with a public interest. The public have no peculiar interest in the manufacturing activities of the sugar refiner as distinguished from the manufacturing activities of other manufacturers under like conditions.

Of course the State has a general interest in such ordinary and usual police regulations, as the health, morals or safety of the public require. But if it be the hours of labor, hygienic conditions, safety appliances, etc., which are to be regulated, then clearly it is not the business of sugar refining which is to be regulated, but hours of labor, hygiene, safety devices, etc., *the laws as to which must uniformly apply to all manufacturers under like physical conditions in order to be valid.* To such general police laws of uniform operation there is of course no constitional objection.

The sale and distribution of refined sugars are not affected with a public interest. The public has no peculiar interest in controlling such sale and distribution as distinguished from its interest in the control of the sale and distribution of other food products and staples of commerce in common use.

The public has an interest in the purity of sugar offered for human consumption in Louisiana, but the Act is palpably not designed to accomplish that end, for to be valid such a regulation as to purity must perforce embrace all sugars sold for consumption and not merely the sugars produced by the very limited class of refiners subjected to the regulations of the Act.

The total absence from the business of sugar refining of the one element necessarily present in all those kinds of businesses, which are " affected with a public interest " by reason of their nature, is conclusive that the business is essentially private. The absent element is the holding out to render the public some peculiar and special *service* of a quasi-governmental character such as all true public utilities render. Such holding out may result either from a voluntary dedication of otherwise private property to a public use, as a grain elevator, or from the acceptance of State aid or permission, as a railroad, which involves the holding out to serve the public in respect to that for which the State aid or permission has been granted, or from the transaction of some special business, like banking or insurance, in which the ordinary laws of competition fail and the public imperatively require a special form of regulation. In this class a manufacturer has never yet been classed.

Of course we use the expression " holding out to serve the public " in the restricted legal sense, and not in the broad sense in which it may be said that every merchant or manufacturer holds out a standing offer to sell to those who will buy. *If this broad sense were taken, there could be no private business.*

In no case which can be found has it ever been held that a business involving barter and sale and manufacture, is, *as a business*, affected with a public interest. In every case where a business was held to be affected with a public interest, the decision rested upon the principle that the owner held himself out to render a special kind of service to the public, which necessitated the use of his property by the public—in a word, that the owner had dedicated his property to a public use.

Judge COOLEY in his work on Constitutional Limitations (6th Ed., p. 736) says:

> "What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, *for that would subject the stock of the merchant, and his charges, to public regulation.* The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices."

In the case at bar, there has been no holding out to serve the public. On the contrary, the business has always been conducted as a private business. Indeed, it would be difficult to imagine how such a business, involving all of the complex commercial elements of barter and sale and manufacture, depending solely for success upon the skill and judgment of the owner as to its details, could be regarded as dedicated to the public service in the special sense of our constitutional jurisprudence. The business requires no State aid or permission, is free to any one to engage in and to gain or lose according to his capacity to conduct the business.

While the courts have laid down no strict and infallible test by which to determine whether a business is affected with a public interest, it is uniformly recog-

nized that the presumption is that business is private and that good reason must be shown for treating a particular business differently from others and putting it into the exceptional class.

Freund on Police Power, Sec. 373, p. 331;
Munn vs. Illinois, 94 U. S., 139, 140;
People vs. Budd, 117 N. Y., 1;
Budd vs. New York, 143 U. S., 532, 533, 544; dissenting opinion, 549, 550, 551;
Brass vs. Stoesser, 153 U. S., 391, 404;
Millett vs. People, 57 Am. Rep., 873, 874 (117 Ill.);
German Alliance Ins. Co. vs. Lewis, 233 U. S., 406, 407, 412, 414, 415, 416, dissenting opinion, 428, 429.

In none of these cases nor in any case in which this court reached the conclusion that a particular business was "impressed with a public use" was a manufacturing business under consideration. In each of these cases, beginning with Munn vs. Illinois, *supra* (decided in 1876), down to German Alliance Insurance Company vs. Lewis, *supra* (decided in 1914), the business bore some peculiar relation to the public welfare and the right to regulate was based upon such peculiarity.

The case upon which the appellant chiefly relies and which unquestionably is the strongest for his contention, is the very recent case of German Alliance Insurance Company vs. Lewis, *supra*, but even a cursory examination of the decision will show that the two cases are plainly distinguishable. In that case this court held that the business of insurance did occupy such a peculiar position as to justify governmental regulation and that conclusion was predicated chiefly upon four facts:

1. That the contract between the Insurance Company and the insured was not an ordinary commercial contract but that all such contracts were, by reason of the business, necessarily interrelated and interdependent.

2. As the rates of insurance rested wholly in the discretion of the Insurance Company and were adjusted according to well known actuarial laws, there was no "higgling of the market," to use the term of Adam Smith, and the ordinary laws of competition could not prevail.

3. By reason of the large funds which insurance companies accumulated and invested, the business was assimilated to that of banking, as to which a peculiar degree of public regulation had always been required.

4. Insurance Companies had been regulated for many years without question and thus the conception of its public character was more than "an unconsidered impulse" and represented "the universal sense of a people."

None of these elements exist in the case of any manufacturing enterprise, and certainly they do not exist in the manufacture of sugar. The contracts between buyer and seller are not co-related and interdependent. There is the utmost freedom of competition and an incessant "higgling of the market"; the contracts for the purchase of raw and the sale of refined sugar are regulated by the open laws of supply and demand; and lastly, the only "universal sense of a people" which exists with reference to manufacturing enterprises, including sugar refineries, is that they are not impressed with a public use, for no other legislation can be cited which seeks to treat a sugar refinery or other ordinary manufacturing establishment as a public utility.

The declaration in Act No. 10 to the effect that the business of sugar refining is affected with a public interest *by reason of its nature is*, therefore, untenable.

Conscious of this weakness, the draftsman of the Act attempted to fortify the validity of the statute by basing the alleged public interest in the refining business upon a pretended "monopolization" thereof, but this wholly meaningless abstraction does not strengthen the statute.

"Monopolization" by whom? The statute does not say.

If it means that all sugar refiners jointly monopolize the business, it is literally true, but the suggestion becomes an absurdity, for on that pretense all businesses could be regulated, prohibited, condemned and penalized, because all who are engaged in a given business in an absurdly literal sense monopolize that business.

Assuming that this legislative declaration of an alleged monopolization has any intelligible meaning, then a more natural construction would be that those who are in the subjected class and who are by reason of such unspecified monopolization subjected to a peculiar and drastic form of regulation, are the alleged monopolizers. But the absurdity of the statute becomes manifest when it is recalled that the refiner becomes by legislative declaration a monopolizer, not by reason of the relative amount of his business in the sale of refined sugar or his dominating position in the trade, or his trade methods, but wholly by the accidental relation which one part of his raw material bears to another part. In other words, the smallest planter in Louisiana, if he shall buy more raw sugar than he grows cane, *ipso facto* becomes a "monopolizer," even though his proportion of the commerce in refined sugar may not be one per cent. Upon the other hand, if the American Sugar Refining Company should increase its output and to secure the necessary raw material should buy sufficient plantations to ensure a growth of cane in excess of the raw sugar purchased by it, then it ceases to be a monopolizer, although with such extension of its output it might completely dominate the trade in refined sugar.

Moreover the alleged monopolization does not take into account the comparative and always varying amount of business done by the subjected and exempted classes respectively. The exempted class might at any time have a much larger proportion of the refining business than the subjected class.

How then can the subjected class be regarded as a monopoly by mere legislative fiat ?

If the statute means that one refiner, viz., the complainant in this suit, has monopolized the business, then as the act is not restricted in its operation to the complainant, it visits the sins of the guilty upon the innocent and is thus indefensible. Besides the legislative declaration that this complainant has committed the crime of monopolizing the sugar refining business in Louisiana, would then be in substance and form a bill of attainder and therefore void. Under the Constitution and statutes of Louisiana, to monopolize a business is unlawful and no one can be adjudged guilty of this crime except by a formal adjudication of the Judicial branch of the Government, proceeding according to "due process of law." Even though a Legislature could adjudge a citizen guilty of a crime, without a preliminary charge and a full day in Court, yet it cannot be that a Legislature could under our form of Government adjudge that, because one citizen had committed a crime, the status of a whole class, including the innocent and the guilty, should be thereby adversely affected. No such absurdity was ever before suggested in any statute. It reminds one of "Alice in Wonderland."

A business is subject to peculiar regulation, as "impressed with a public use", by reason of its intrinsic nature and not by reason of the fact that one or more individuals, who engage in it, may violate the monopoly statutes. A business that is *juris privati* does not become less so because some one who is engaged in it may by unlawful acts monopolize it. Upon the other hand, a business may be "impressed with a public use", although no element of monopoly exists. Undoubtedly a *natural* monopoly is peculiarly subject to regulation and was the original basis for special regulation, but in this class of cases the monopoly is either one that is granted by the Government or which is inherent in the nature of the business,

as is generally the case with public utilities where the ordinary laws of competition do not have free play.

As the statute does not specify who or when or in what manner the refining business has been monopolized, the most intelligible construction that can be given to it is that it does not refer to any class or to any refiner, but that the sugar business is *inherently* monopolistic in its character.

This Court has always exercised the right to review such a declaration of the Legislature, for in every case of this class, from Munn vs. Illinois down to German Insurance Co. vs. Lewis, the question, which this Court has always passed upon, was whether the Legislature was justified in treating the business as no longer *juris privati*, and in reaching this conclusion it necessarily took into consideration the nature of the business as a matter of common knowledge.

There is nothing in the statute other than the vague declaration and nothing in common knowledge which differentiates the manufacture and sale of sugar from the manufacture and sale of any other staple of commerce. Any one can engage in it ; any one can build a refinery ; any one can buy raw sugar, for in all parts of the world there are open markets for its sale ; any one can refine it and any one can sell it freely in the channels of commerce.

To hold that the manufacture and sale of this very common and ordinary staple of commerce is inherently monopolistic would be to hold that the manufacture and sale of every other staple of commerce is inherently monopolistic and no ordinary business, which is the subject of manufacture and sale, would be any longer *juris privati.*

No longer stride toward universal socialism could well be imagined. Certainly there is nothing in any decision of this Court to justify so great a departure from the theory of our laws and the form of our Government.

SECOND.

THE STATUTE DENIES TO COMPLAINANT THE EQUAL PROTECTION OF THE LAWS AND THEREIN VIOLATES THE FOURTEENTH AMENDMENT IN THAT, WHILE SAID ACT PURPORTS TO REGULATE THE BUSINESS OF SUGAR REFINING, IT UNREASONABLY EXEMPTS FROM SUCH REGULATION CERTAIN CLASSES OF SUGAR REFINERS.

While the pretended object of the Act is to protect the business of sugar refining and the public from monopolization therein, the Act specially exempts from its operation all sugar refiners who may at any time buy and refine less raw or other sugar than the aggregate of the sugar produced by them from cane grown or purchased by them. The classes thus exempted are admittedly sugar refiners and are inherently as capable of monopolizing the business and injuring the public as are those sugar refiners of the classes subjected to the regulation of the Act.

The exemption appears upon the face of the Act. Section 15 provides (Record, p. 23):

> "The business of refining sugar within the meaning of this Act is hereby defined to be that of any concern that buys or refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys and refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it."

It is seen that this Section purports to define "the business of refining sugar within the meaning of this Act"; in other words under the guise of an arbitrary legislative definition the Act in its necessary intendment works an exemp-

tion from regulation of every sugar refiner who does not come within the definition of the business.

The result is that any person in the business of refining sugar, who may at any time buy and refine less raw or other sugar than the aggregate of the sugar produced by him from cane grown or purchased, is not subjected to any regulation whatever. And this though he is a sugar refiner in fact and as much capable of inflicting the injury on the public contemplated by the statute as any one of those arbitrarily selected sugar refiners subjected in terms to regulation.

An exemption which could not have been made in terms, cannot be made by an arbitrary restriction of a natural class through legislative definition.

It is as if a law, which could not accomplish its avowed purpose except by embracing all natural persons, should seek to limit its operation to persons having red hair, by arbitrarily defining natural persons " within the meaning of the act " to be persons having red hair. Certainly a result which cannot be lawfully accomplished directly cannot be accomplished indirectly.

The statement made at page 7 of appellants' brief that the Act excludes " from its operation sugar planters, refining the sugar from their own cane," is entirely erroneous, as a reading of section 15 quoted above clearly shows. Equally erroneous and quite misleading is the language at pages 37 and 38 of the same brief, intended to give the impression that the Act excludes all sugar planters. In fact, the line is drawn not between refiners who do not grow cane, and planters who do, but between two groups of planters (who are also refiners), the distinction between the groups being rested on the purely arbitrary fact of whether such a refiner-planter buys more or less than one-half of the raw sugar he refines.

I.

THOSE OF THE CLASSES EXEMPTED ARE ADMITTEDLY SUGAR REFINERS AND ARE INHERENTLY AS CAPABLE OF MONOPOLIZING THE BUSINESS AND INJURING THE PUBLIC, AS ARE THOSE SUGAR REFINERS OF THE CLASSES SUBJECTED TO REGULATION.

We contend that the business of all sugar refiners is the same in essence; and that the allowance to the favored classes of the privilege of buying as much as fifty per cent. of the sugar to be refined, constitutes an unreasonable classification.

The Act No. 10 carries within itself a complete admission that all business of sugar refining is the same. The framers of the Act were under the necessity of fixing upon an arbitrary percentage of the raw material purchased or grown by a planter-refiner in order to exclude him from the natural class. From the very nature of the determining factor of exemption—an arbitrary percentage of raw material purchased—it follows that the business of all is the same. *The source of the raw sugar used for refining, cannot, by any stretch of the imagination, affect the nature of the business. If a refiner refines raw sugar, he is a sugar refiner without regard to the accidental origin of the raw sugar used.* However obtained, whether grown or purchased, raw sugar is raw sugar. Economically, chemically, or in any other practical respect, the raw sugar utilized by the exempted and the subjected classes is precisely the same.

The only basis of the attempted classification rests upon the purely non-essential fact of the origin of a part of the raw supplies.

Nor can it be contended that there has been an attempt to classify by size, for, even if such a basis of classification can be conceived to be reasonable, *any exempted refiner may at any time become as large as any subjected refiner.*

Any one or more of the favored refiners, individually or in

combination, may by reason of the very advantages which the exemption allows grow to be even larger than any one of the subjected refiners.

Thus a grossly unreasonable discrimination is made by the Act in imposing regulation solely upon the sugar refiner who buys more than fifty per cent. of his raw sugar. It is as if the Act should say in terms to sugar refiners: "You may injure the public by monopolizing the sugar refining business—which privilege is denied all other refiners—provided only you grow or buy the cane out of which you make not more than fifty per cent. of your refined sugar."

Since the *source* of the raw material bears no real or substantial relation to the business of refining sugar, the alleged evils which the Act is designed to reach may result from the operations of any refiner whatever.

Some of the many results of this indefensible attempt to discriminate by a purely artificial classification have been effectively stated by the Court below in its opinion as follows (Record, pp. 84–5):

> "This exempts from the operation of the act any one engaged in the purchase of sugar, though he is also engaged in the business of refining sugar, if he does not carry on that business in Louisiana, and exempts him, though he may carry on that business in Louisiana, if in doing so he does not buy and refine more raw or other sugar than the aggregate of the sugar produced by him from cane grown and purchased by him. One engaged in Louisiana in the business of sugar refining, as defined by the statute, may if he does not buy sugar in any other state systematically pay in Louisiana a less price for sugar than any one else pays in any other state, without subjecting himself to the adverse *prima facie* presumption and penalties prescribed by the act. One engaged in the business of purchasing sugar, if he is not also engaged in the business of refining, may, without violating the act, systematically pay in Louisiana a less price for

sugar than he pays in any other state. One who is engaged in the sugar refining business anywhere else in the world, except in the state of Louisiana, may, without subjecting himself to any of the penal consequences provided for by the act, systematically pay in Louisiana a less price for sugar than he pays in any other state. We cannot conceive of any fair reason for exempting such a person from the operation of the act, and at the same time subjecting to its penal provisions one whose situation and conduct are exactly the same in every particular, except that his refinery is located in Louisiana, while the exempt person's refinery is located elsewhere. *The result is to make the fact of one's ownership of property in Louisiana the test of the criminality of his conduct in buying a commodity in that state.* We take it that a purpose of the statute was to prevent a practice resulting in the undue depreciation of the price of a commodity of the state. But the statute undertakes to prevent such a practice only in the case of certain buyers, leaving beyond the reach of the prohibition other buyers whose practices may be identical and equally harmful in their tendencies. A discrimination between two buyers of a commodity of a state, which results in imputing criminality to the conduct of one of them in making his purchases if he owns property or carries on another business in the state, while exactly the same conduct of another is left free of such an imputation, though he owns the same kind of property or is engaged in the same business, but not in the same place, is not based on any difference between the conduct of the one and that of the other. Those who are attempted to be subjected to the penal provisions of the act are determined by an arbitrary selection, wholly without regard to any difference between their delinquency and that of others whom the statute leaves untouched. This is such a denial of the equal protection of the law as renders the statute invalid and unenforceable."

It taxes human ingenuity to suggest an even half-way plausible justification of such arbitrary classification.

II.

THE ACT PROVIDES NO CERTAIN STANDARD BY WHICH THE INDIVIDUAL REFINER MAY BE CLASSIFIED.

There is no unit of time prescribed by which to determine the classification. The Act is totally silent as to when and with reference to what period of operation the classes are to be formed, and it is thus impossible to determine whether a given sugar refiner is in the subjected class or in the favored class.

In the absence of any time standard whatever, the applicability of the Act to a given refiner would presumably depend upon th character of his transactions from day to day, if not from hour to hour.

To illustrate: On October 1st a refiner *buys* all of his sugar and should, therefore, be subjected to the regulations of the Act. On October 2d, he uses only raw sugar from cane raised or bought by him, and is exempted from regulation.

But even if some definite unit of time be arbitrarily legislated into the Act, then, in the last analysis, enforcement against a particular refiner must necessarily rest upon the refiner's own expectation of coming before the end of the prescribed time within the one class or the other. For if it be attempted to subject him to regulation day by day, who can question his assertion that before the prescribed period of time has elapsed he will be in the favored class and, therefore, not subject to regulation at any time during the entire period?

III.

THE DISCRIMINATIONS OF ACT NO. 10 CAN NOT BE JUSTIFIED AS BEING IN AID OF AGRICULTURE.

The declared object of Act No. 10 is to protect the business of sugar refining and the public from monopoly therein, and no refiner may therefore be legally exempted from the regulations of the Act, unless it be clear that he or they are

inherently incapable of monopolizing the refining business. As has been shown, there is no inherent reason why the exempted classes might not monopolize the refining business. Indeed, they are more likely to monopolize the business than a refiner, who must buy the greater part of his raw material. But the exemption does not relate to the *grower* of cane, for it is cane "grown or *purchased*" by the exempted refiner.

An exemption which may be valid with reference to the particular object of one law, may be grossly unreasonable and unequal with reference to the different object of another law. Whatever may be the power of classification for purposes of taxation, yet, where prohibitory police regulations are under consideration, the acts and contracts of persons generally cannot be condemned, forbidden or regulated as inimical to the public welfare, while at the same time the similar acts and contracts of agriculturists are exempted from the rule of condemnation and regulation. Such a distinction must be justified by some intelligible reason, which would make such a contract of an agriculturist defensible. Here the classification is made with reference to the protection of the public from the effects of the condemned acts and contracts, and the evil effects of such acts and contracts are the same whether practiced and made by an agriculturist or another; hence, the classification is unreasonable—unreasonable, indeed, even though the exemption of the agriculturist purports to be confined to acts and contracts relating solely to products raised by him.

In considering the case of American Sugar Refining Company vs. Louisiana, 179 U. S., 89, upon which the State chiefly relies to support this exemption, the distinction must be kept in mind between a tax law and a law passed in the exercise of the police power for the protection of the people, for an exemption which may be justified in the one case may be grossly unreasonable in the other.

In that case it was claimed that a classification *for pur-*

poses of taxation, which subjected to license taxation sugar refiners generally, was not unreasonably discriminatory because it exempted from license taxation "planters and farmers grinding and refining their own sugar and molasses."

Even in that case, the Court seemed to construe the exemption as reasonable only if confined to the sugars of the planter's own growth.

This Court has recognized this clear distinction between taxation and police regulations, and itself expressly explained and distinguished the case last cited, for in the subsequent and leading case of Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, where this Court held unconstitutional a law of Illinois with reference to monopolies, combinations, etc. in restraint of trade, upon the sole ground of unreasonableness of the exemption therein from the operation of the law of "agricultural products or live stock while in the hands of producer or raiser," this Court (pp. 561-2) discussed the case of American Sugar Refining Co. vs. Louisiana and the earlier case of Bells Gap R. R. Co. vs. Pa., 134 U. S., 232, as follows:

> "In American Sugar Refining Co. vs. Louisiana, we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the *business* of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class. * * *
>
> "The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. *It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations*

that could not, in the nature of things, apply to a State enactment like the one involved in the present case. * * * A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. *But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity.* It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, *to enter the domain of trade or commerce,* and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

The distinction is for present purposes academic, as the Legislature has not assumed in the statute now under consideration to rest the exemption of the favored classes of refiners on the ground of aiding agriculture.

For instance, the Act exempts foreign sugar if bought by the favored refiner, while it does not exempt Louisiana sugar if bought by the subjected refiner.

It exempts sugar made from cane bought or raised by the favored refiner, while it does not exempt sugar made from

cane bought from another by the subjected refiner or raised by him.

On the other hand, the exemption does not apply to any raw sugar—foreign or domestic—bought by the subjected refiner, while it does apply to all raw sugar—foreign or domestic—bought by the favored refiner to the extent of 50 per cent. of his whole refined product.

It is clear, then (assuming the existence of the power, which we have already shown does not exist) that if the Act No. 10 had been designed to foster agriculture, it would necessarily have exempted only Louisiana grown cane and sugar and such results could have been accomplished only by exempting refiners whose entire output is made from the Louisiana sugar.

The rule of 50 per cent. cleavage is of itself a demonstration that the Act was not designed, and is not capable of being construed, as an aid to agriculture.

In Cotting vs. Stockyards Co., 183 U. S., 79, this court recognized an evident attempt to discriminate between "stockyards doing a large and those doing a small business," and held that any discrimination "based simply upon the quantity of business which each may do" was indefensible under the Fourteenth Amendment. In so doing it simply reaffirmed the clear principle of equality as announced by it in the case of Gulf, Colorado and Santa Fe Ry. vs. Ellis, 165 U. S., 150, 159, as follows:

> "A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it

cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates." Connolly v. Union Sewer Pipe Company, 184 U. S., 540, 562.

The leading case, *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, is so conclusive of the case at bar, not merely by the force of its reasoning upon the general rules applicable, but by the force of the analogy of the case itself, that we quote again from the opinion of Mr. Justice HARLAN.

The exemption there considered read that "the provisions of this Act shall not apply to agricultural products or live stock while in the hands of producer or raiser." This Court held that the exemption was unreasonable *and rendered the whole law invalid*, as denying the equal protection of the laws to the classes subjected to the provisions of the statute.

The Court said (pp. 560, 563–5, italics ours):

> "We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and live

stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturists and raisers of live stock, *are all in the same general class, that is, they are all alike engaged in domestic trade, which is of right open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.*

The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification '*must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis.* * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must, appear not only that a classification has been made, *but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.*' *Gulf, Colorado & Santa Fe Railway vs. Ellis*, 165 U. S., 150, 155, 159, 160, 165. * * *

Returning to the particular case before us, and repeating or summarizing some thoughts already ex-

pressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful * * *. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to contro. prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State."

There is a striking similarity in the provisions of the Illinois statute (condemned in the Connelly case) and the Louisiana statute, now under consideration. Of the two the former is the more defensible, for it presented a tangible and clear cut exemption of agriculturists. To assimilate the facts further, suppose the Illinois statute had provided that any one, who was engaged in agriculture to the extent of more than fifty per cent. of any product sold by him, should be exempted, otherwise not. Can it be doubted that the Court would have regarded this as even more artificial and unreasonable?

The Connolly case has never been modified or overruled. On the contrary, it has been reaffirmed in the recent case of International Harvester Co. vs. Missouri, 234 U. S., 199, 215.

The cases on classification, cited in appellants' brief as authorities in support of the constitutionality of the Act in question, can all be readily distinguished.

Many of the cases cited are tax cases, and are distinguish-

able under the authority of *Connolly vs. Union Sewer Pipe Co.* 184 U. S., 540, 563. Such are :

Travelers' Insurance Co. vs. Conn., 185 U. S., 364.
King vs. Mullins, 171 U. S., 404.
Postal Telegraph Co. vs. Adams, 155 U. S., 688.
Magoun vs. Illinois Trust & Sav. Bank, 170 U. S., 283.
Cox vs. Texas, 202 U. S., 446.
Quong Wing vs. Kirkendall, 223 U. S., 59.
Singer Sewing Machine Co. vs. Brickell, 233 U. S., 304.

In the other cases so cited by appellants on this point, the Court found that the classification was based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect of which such classification was imposed, and held that there was no arbitrary selection.

We may briefly refer to these cases :

St. John vs. New York, 201 U. S., 633.

In this case, a New York statute which prohibited the sale of adulterated milk, provided that, where the milk was sold by its producer, proof that the milk was in the same condition as when received from the herd should be a defence; whereas, in the case of a non-producer, *i. e.*, an ordinary city milk dealer, such proof should not serve as a defense. The Court sustained the statute on the ground that, in the case of the farmer, the source of the milk could be certainly traced; whereas, in the case of the ordinary vendor, this would usually be impossible, and that, therefore, to permit the non-producing vendor to take advantage of the defense referred to would lead to evasion.

Central Lumber Co. vs. South Dakota, 226 U. S., 157.

A statute of South Dakota prohibited any one handling any commodity in general use "intentionally for the purpose of destroying the competition of any regular established

dealer in such commodity * * * to discriminate between different sections of this State, by selling such commodity at a lower rate in one section than such person charges for such commodity in another section," freight considered. The statute was sustained, as being within the police power of the State. The Act was clearly constitutional, irrespective of the question of classification ; because the discrimination aimed at was one used intentionally for the purpose of destroying competition. Acts to this effect have been frequently passed by State legislatures and by Congress,—a late example being the Clayton Act—and have been unif rmly considered constitutional.

Watson vs. Maryland, 218 U. S., 173.

In this case, a Maryland statute required all physicians to apply for a license and submit to an examination, &c., except those who had practiced medicine before a certain date and could show that, prior to that date, they had a certain number of patients. This exception was justified by the Court (at page 177), on the ground that men who had practiced a profession for a number of years might be assumed to have qualifications which others were required to show as a result of an examination. The statute, among other exemptions, also excepted resident physicians and students in hospitals, and it was upon their exemption that the stress of the argument for the appellant was put. These latter exceptions were justified, upon the ground that hospitals are the subject of municipal or State regulation or control and that employment in them is by boards responsible to public authority, and hence the supervision necessary for the ordinary practitioner of medicine was not required. It is obvious that there is no likeness between this Maryland statute and the Louisiana Act under consideration.

Carroll vs. Greenwich Insurance Co., 199 U. S., 401.

In this case, the provisions of the Iowa Code prohibiting

combinations of insurance companies as to rates, commissions, etc., were held constitutional under the general power to prohibit combinations, and, in this respect, to be little more than the application to a particular case of the general statute of Iowa concerning combinations. Here, the line was drawn between fire insurance companies and all other callings. There was no discrimination among fire insurance companies, as there is among sugar refiners under the Louisiana Act in question.

Keokee Consolidated Coke Co. vs. Taylor, 234 U. S., 224.

In this case, the Act prohibited "any person, firm, or corporation, engaged in mining coal or ore, or manufacturing iron or steel, or in any other kind of manufacturing" from paying wages by means of scrip convertible into merchandise. The language just quoted is so broad as to distinguish the case from the one at bar, without comment.

German Alliance Ins. Co. vs. Hale, 219 U. S., 307.

Here, the statute was one directed at combinations between insurance companies; but, instead of prohibiting such combinations outright, the statute penalized them by providing that juries, in awarding damages in suits on policies where the defendant company had been connected with a combination, should add twenty-five per cent. to the amount of actual damages awarded. This Court sustained the Act, on the ground that the Legislature could prevent combinations by any means, and therefore by imposing a penalty. There is no likeness between that case and the one at bar.

Williams vs. Arkansas, 217 U. S., 679.

In this case, a statute of Arkansas prohibited drumming or soliciting on trains for business for any "hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeons, or other medical practitioner." The second section of the Act also made it unlawful for any railroad or common

carrier to permit such "drumming or soliciting for any business or profession whatsoever," except by agents of transfer companies and news men, who were to be permitted for the convenience of passengers. There was, therefore, really no distinction of classes at all contemplated by the Act. The opinion, however, discusses only the language of the first section, and assume, as a basis for the distinction, that it was to protect travelers from other States, many of whom were ill and were on their way to the Arkansas Hot Springs. This Court said that the class of drummers or solicitors mentioned in the Act were doubtless the only ones who plied their vocation to any extent on railroad trains, and that, therefore, the law makers deemed it unnecessary to legislate against others. The distinction between a large class of drummers, which had been brought into existence by the popularity of Arkansas Hot Springs as a health resort, and who, by their number and persistence, had become an intolerable nuisance, and on the other hand, the relatively small class of ordinary commercial drummers, who seldom, if ever, attempt to solicit on a train, is a natural and reasonable one.

International Harvester Co. vs. Missouri, 234 U. S., 199.

In this case, the Court, in effect, held that labor was not the same as commodities, and also that purchasers of commodities might be regarded as a different class from the manufacturers and sellers of the same, in view of the relative difficulty and almost impossibility of any combination among purchasers. The Court says, at page 213—speaking of the contention of the appellant in this case:

> "Under the principle applied, a combination of all the great industrial enterprises (and why not railroads as well?) could not be condemned, unless the law applied as well to a combination of maidservants or infant nurses, whose humble functions preclude effective combination."

Boseley vs. McLaughlin, 236 U. S., 385.

In this case, a California 8-hour statute for women employees excepted graduate nurses in hospitals. The allegations of the bill showed that graduatee nurses in hospitals are in a separate class from other nurses; that they do not ordinarily perform the work of nursing the sick; but act as overseers or assistants to the medical staff. This made their work peculiar and distinct, and it was obviously within the power of the Legislature "to recognize an exigency with reference to their employment making it advisable to take them out of the general prohibition."

Mo. Pac. Railway Co. vs. Omaha, 235 U. S., 121.

In this case, a municipal ordinance required a railroad company to construct a viaduct across a street in a certain manner. The railroad contended that, by constructing the viaduct in a different manner, the cost would be much less and the result equally beneficial. The Court very properly said:

> "This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government."

This was not a case of classification at all, and we are at a loss to know why appellant cites it *in extenso* on this point.

Mallinckrodt Chemical Works vs. Missouri, 238 U. S., 41.

Here, a Missouri statute required the filing of a certain affidavit by corporations, which was not required from individuals in the same business. This Court said, at pages 55-6, that, while "corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as properly be subject" yet—

> "corporations, unlike individuals, derive their very right to exist from the laws of the state * * * and

they act only by agents. * * * The Legislature may reasonably have concluded that, for these and other reasons, corporations are peculiarly apt instruments for establishing and effectuating those trusts and combinations against which the prohibition of the statute is directed; that their business affiliations are not so easily discovered and traced as those of individuals, and that there was, therefore, a peculiar necessity and fitness in annually requiring from each corporation a solemn assurance of its non-participation in the prohibited practices."

German Alliance Ins. Co. vs. Lewis, 233 U. S., 389.

This case is cited by the appellants because it sustained (at page 418) a statute which distinguished between farmers' mutual insurance companies of a co-operative character and insuring only farm property, and all other insurance companies. This Court pointed out the difference between stock companies for profit and farmers' mutual insurance companies, which were not stock companies, and *were presumably not conducted for profit.* The distinction between this case and the case at bar is obvious.

IV.

THE EXEMPTION INVALIDATES THE ENTIRE ACT.

An exemption which shows the unwillingness of the Legislature to impose a law upon an entire class is necessarily void if its imposition upon a part of such class is unconstitutional. No Court can guess whether the Legislature would have imposed the law upon the entire class, in view of its expressed disinclination to do so.

Upon this point Connolly vs. Pipe Co., 184 U. S., 540, is conclusive. This Court said:

"Looking then at all the sections together, we must hold that the Legislature would not have entered upon

or continued the policy indicated by the statute unless agriculturists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section" (pp. 563–565).

THIRD.

THE STATUTE PROVIDES THAT A SUGAR REFINER SUBJECT TO ITS TERMS, WHO SYSTEMATICALLY PAYS IN LOUISIANA A LESS PRICE FOR SUGAR THAN HE PAYS IN ANY OTHER STATE, SHALL BE PRIMA FACIE PRESUMED TO BE A PARTY TO A MONOPOLY OR COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE AND COMMERCE. SAID ACT VIOLATES THE FOURTEENTH AMENDMENT BY CREATING AN UNREASONABLE PRESUMPTION OF GUILT, AND THEREBY WORKS A DEPRIVATION OF LIBERTY AND PROPERTY AND A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

I.

THE ACT WORKS A DEPRIVATION OF THE LIBERTY AND PROPERTY OF COMPLAINANT AND A DENIAL TO IT OF THE EQUAL PROTECTION OF THE LAWS IN CREATING AN UNREASONABLE PRESUMPTION OF GUILT.

Section 7 provides:

> "That any person engaged in the business of refining sugar within this State who shall systematically pay in

> Louisiana a less price for sugar than he pays in any other state shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and *upon conviction thereof* shall be subject to a fine of five hundred dollars a day for the period during which he is adjudged to have done so."

The presumption is, therefore, necessarily predicated upon the arbitrary, unsupported and unreasonable assumption that the value of sugar in Louisiana is at all times and in all places within the State as great as in every other part of the United States. This violent assumption completely ignores the difference of trade conditions, which may and do exist as between Louisiana and other States and as between different points in Louisiana itself; it ignores the unavoidable effect of the law of supply and demand; the difference in price and value as between the primary markets and the ultimate markets, due to cost of transportation and the law of supply and demand, and the inevitable difference in cost of production between Cuban, Java, Hawaian, Porto Rican and Louisiana sugars.

The presumption further ignores the fact that there are many markets for sugar in Louisiana with a necessary difference in prices at the same moment of time, and it also ignores the fact that there are many markets in other States with the same variations in prices, due to natural causes wholly unconnected with monopoly.

The presumption, therefore, to be justified, involves the assumption that there can be but one natural price of sugar throughout Louisiana, regardless of difference in conditions and distance from the consuming market, and that this price must always be as high as the highest in any other part of the United States.

In order to hold the presumption reasonable, the Court must also find that the price and value of sugar throughout the United States is naturally equal and uniform, regardless of

remoteness from consuming centers, the cost of production and the operation of economic laws. When the Louisiana crop comes upon the market and creates an inevitable glut, there is and has always been a difference between the New Orleans and New York prices. This is not a fixed differential but a difference in price which approximates the New Orleans-New York freight rate. The amount of sugar offered for sale by the Louisiana planters during November and December of each year is far in excess of the refining capacity of all the refineries in Louisiana. If it purchases more sugar than is sufficient to run its refinery from day to-day, the Appellee must either store the surplus sugar, or pay the cost of the freight upon the same to its northern refineries. The Appellee, in its bill of complaint (Record, pp. 7–10), stated concisely the economic reasons for this difference in price at certain periods, and showed that it did not necessarily result in a benefit to it equal to the difference, or any benefit whatever. Among others the following reasons are stated (Record, pp. 8, 9):

> " (1) To the extent that the Louisana sugar thus purchased by complainant has been shipped by it to a Northern port, the cost of transportation has substantially equalled the difference in the prices at the two ports.
>
> " (2) A large part of the Louisana sugar purchased by complainant and not so shipped has had to be carried in storage for several months at a time of the year when the price of raw sugar usually declined. Owing to the close connection between the prices of raw and refined sugar in the United States under the action of competition, a decline in the price of raw sugar means a corresponding decline in the price of refined sugar; so that a refiner, who has carried raw sugar on a declining market inevitably loses substantially the amount of such decline when he comes to make and market the refined article. * * *
>
> " (3) The cost of carrying raw sugar in storage, in-

cluding loss in weight, inversion, interest, insurance and other incidentals and storage proper, has been between five and six cents per hundred pounds per month. (Since complainant has built its Chalmette refinery, the storage element of this loss has been materially reduced.)

"(4) Formerly, and down to the time when the Chalmette refinery was opened, a large part of the refined sugar manufactured by complainant in Louisiana was sold in the Central West, particularly in the large cities bordering on the Missouri River, which region was and still is one of the great markets for refined sugar in the United States. Complainant also sold large quantities of refined sugar in the States further north, principally Minnesota, Iowa, the Dakotas, etc. One of the chief incentives for building the costly Chalmette refinery was the desire to continue and extend the sale of refined sugar in the said territory which, by reason of lower freight rates, was more accessible to New Orleans than to the Eastern seaboard. Owing, however, to the great and rapid increase, in States west of the Missouri River, in the production of beet sugar, which now forms about one-sixth of all the sugar of every kind consumed in the United States, and which is always sold at prices below those of cane sugar, complainant has to a great extent been driven out of the Missouri River territory and the more northerly States mentioned. Having thus lost its markets in the Central West, as aforesaid, and it being advantageous to operate said Chalmette refinery up to a certain capacity, in order to keep down the manufacturing expense, complainant has been obliged to send a portion of the sugar refined into States further east, thereby coming into competition with sugar shipped by Eastern refineries. Under these circumstances it has been necessary for complainant, in order to equalize freights, to absorb a portion of the freight on all the sugars so sold in such remote markets."

To escape the presumption created by the Act, the refiner is forced, if he buy in Louisiana and elsewhere, to pay in

Louisiana, regardless of the economic conditions there prevailing, the highest price which the market conditions of any other market require him to pay in such other market. The only alternative is for such refiner to forego purchasing either in Louisiana or in all other markets.

This presumption applies solely to a refiner who buys both in Louisiana and elsewhere; if the Louisiana refiner buy only in Louisiana no such presumption is created against him, however little he may pay for the Louisiana sugar as compared with the price in other markets and however different may be the prices which he pays in different markets of Louisiana itself.

A presumption which ignores all of the inevitable workings of the laws of trade is necessarily unreasonable and, therefore, illegal.

While the right of a legislature to create presumptions is not denied, it is elementary that all presumptions created must be reasonable, and must have for their foundation human experience and observation; and this can not be said of the presumption created by this Act.

Every presumption which has stood the test of the Courts has been based upon a natural and reasonable connection between the act which gives rise to the presumption and the presumption itself.

The principle has been aptly stated by the Supreme Judicial Court of Massachusetts as follows:

> "As to the provision in the 5th section of the proposed act, that working more than eight hours in any one day shall be *prima facie* evidence of the violation of the statute, there is difficulty. There are many statutes in which the legislature has enacted that the existence of a fact which ordinarily creates a strong probability of the commission of an offense should be *prima facie* evidence of guilt, and such statutes have been held constitutional. *Com. vs. Williams*, 6 Gray, 1; *Com. s.v Pillsbury*, 12 Gray, 127; *Com. vs. Rowe*, 14 Gray, 47;

Com. vs. Barber, 143 Mass., 560, 562, 10 N. E. 330. The provision of this section of the proposed act differs from those referred to in these decisions, and is not within the principles on which the cited cases rest. Under this act, ' in cases where a Saturday half holiday is given,' employees may work more than eight hours on any other days of the week. Such cases will be common, and, in all of them, work for a longer time than eight hours on any other day will not indicate a probability of violation of the law. To provide that such a fact shall constitute *prima facie* evidence that warrants a finding of guilt beyond a reasonable doubt would be contrary to fundamental principles of criminal law. See opinions in *Com. vs. Williams*, 6 Gray, 1.

We are of opinion that the legislature has no constitutional authority to punish any citizen merely upon evidence of the existence of a fact which in ordinary cases has no tendency to establish guilt." Opinion of the Justices, 208 Mass., 619, 94 N. E. 1044, 34 L. R. A. (N. S.) 771.

While it is true that the statute does not impose *directly* upon the subjected refiner this artificial parity of prices, yet it does so quite as effectually, though indirectly, for it compels the subjected refiner to maintain this enforced parity under penalty that his failure to do so will create against him a *prima facie* case of a criminal offense.

The Court will in this, as in all cases, look to the substance and obvious purpose of the law rather than merely to its form. No mere jugglery of words will prevent a Court from determining the essential nature of an invalid statute. As the statute in a later provision permits the Court to grant *pendente lite* an operating Receiver, it is obvious that if the subjected refiner shall create a *prima facie* case of monopoly against himself, he will be in manifest danger of having his property taken from him by a Receiver even before final judgment. Thus the subjected refiner faces the reasonable danger of confiscation if he exercises

the natural right of a trader to buy in the open market at natural market prices. Moreover, as a *prima facie* case carries with it a conclusion of guilt beyond a reasonable doubt, unless overborne with countervailing proof, it follows that if a refiner exercises this natural liberty of contract to buy at the market, he thereby runs the risk of establishing against himself a conclusion that he has been guilty of monopolizing the trade, although it is too clear for contradiction that any trader might systematically pay a less price for sugar in Louisiana than he pays in other markets without in any sense monopolizing the sugar refining business.

The statute must therefore be regarded as an intended although indirect attempt to compel the refiner who buys sugar in the different markets of the United States to pay as much for Louisiana sugar as he pays elsewhere, and whenever sugar is cheaper in Louisiana than anywhere else, he must either pay more than the market price in Louisiana or abstain from buying in other markets, for normally he cannot expect to get sugar in other markets at less than the market prices.

Section 7 therefore raises the very direct question whether the State can by legislative fiat compel parity of prices in a staple of commerce between its markets and those of other States. In this respect the statute is without any precedent in the legislation of the United States.

To find a precedent for such an arbitrary interference with the liberty of contract it is necessary to go back to the reign of Edward II., when English liberty was more theoretical than actual. In 1350, Parliament provided that

> "butchers, fishmongers, brewers, bakers and others, and all other sellers of all manner of victual, shall be bound to sell the same victual for a reasonable price, *having respect to the price that such victual be sold at in the places adjoining.*"

This was followed by a mass of legislation, which sought to fix by legislative fiat the prices of commodities and the wages of labor, but even in those days of tyranny this legislative experiment proved a failure and was altogether abandoned upon the coming of the more "spacious days" of Queen Elizabeth.

It is true that in our Revolutionary War, when our currency was worth eight cents on the dollar and general anarchy prevailed, the Commonwealth of Massachusetts passed a similar statute:

> "That the prices of all articles produced in America, hereinbefore enumerated, excepting those to which the prices of transportation are affixed, *shall be taken and deemed to be prices of such goods and articles in the town of Boston*, and that the selection and committees of the several towns in this state shall be and hereby are empowered to affix and settle in their respective towns what such articles and goods shall be sold for in their towns respectively, according to the proportion the price such goods have borne in such towns *with the price they have been at in the town of Boston.*"

This, too, was repealed in the year 1777 as impossible of enforcement, and from that time until the Legislature of Louisiana passed the statute now under consideration no Legislature of any American State has ever passed a law which attempted by mere legislative fiat to compel a purchaser to pay the same price in varying markets.

Referring to these ancient restrictive laws, which apparently were the model for the draftsman of the present Act, Mr. Justice LAMAR, in his dissenting opinion in the case of German Insurance Company vs. Lewis (233 U. S., 389), said:

> "It is needless to say that these laws were felt to be an infringement upon the rights of men, that they were bitterly resisted by buyer and seller, by employer

> and employee, and were a source of perpetual irritation often leading to violence. But the fact that the English parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of the individual. In time the great injustice in this was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing as proper a rate for public wharves, was able to say in Allnut vs. Inglis, 12 East, 527, 538, '*that the general principle is favored both in law and justice, that every one may fix what price he pleases for his own property or the use of it.*' But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the colonies 'up to the time of independence,' yet, as Judge COOLEY says, since independence, '*it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty.*' That common supposition is rightly founded on the fact that the constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive a person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership."

In Budd vs. New York, 143 U. S., 517, this court (p. 535) approved the reasoning of the Court of Appeals of New York, in holding that

> "no general power resided in the Legislature to regulate private business, prescribe the conditions under which it should be conducted, *fix the price of commodities* or services or interfere with freedom of contract,"

and further (p. 532) approved the more direct statement that

> " the merchant, manufacturer, artisan and laborer, under system of government, are left to pursue and provide for their own interests in their own way, untramelled by burdensome and restrictive regulations, which however common in rude and irregular times, are inconsistent with constitutional liberty ".

What is value? A state of mind. Market value represents the composite state of mind of many buyers and sellers and depends on a thousand contributing circumstances. It depends on the relative desires of the buyer and seller. Given three buyers and one seller, you have high prices. Given three sellers and one buyer, you have low prices. In New York at a given time there may be three buyers and one seller, while contemporaneously there may be in New Orleans three sellers and one buyer. How then can the Legislature provide that in these two markets, the buyer must pay the same price?

It is an economic principle—other factors being equal—that the price of a commodity is less at the source of production than at the point of consumption. Necessarily the element of cost of transportation is an essential item in the total cost of an article and differences in prices between the place of production and the point of consumption will, in the absence of extraordinary circumstances, equal the freight rate.

Shortly after the statute in question was enacted, the Appellee made an investigation of the prices of certain of the leading staples produced in the United States, for the purpose of comparing the prices in the larger cities near the points of production with the prices of the same staples in New York City. The investigation was made in August 1915 and prices were taken as of the 17th of that month and covered cotton, flour, wheat, corn, rice, oats, rye and butter. Appellee was careful to make the comparison of similar grades in wholesale lots and sales made under similar conditions, and the result

was that the differences in prices were found to approximate the freight rate from the point of production to the point of consumption.

On August 17th the price of middling cotton in New Orleans was 9c. the price at New York was 9.25c. The freight rate from New Orleans to New York was 25c. for compressed cotton and for uncompressed 30c. The price of cotton futures on that date were as follows :

	New Orleans.	*New York.*
October	9.09c.—9.10c.	9.29c.—9.30c.
December	9.35c.—9.36c.	9.58c.—9.59c.
January	9.49c.—9.50c.	9.69c.

The difference in these prices runs from 20c. to 23c. or very nearly the freight rate.

A similar comparison was made for rice. It was found that the New York prices exceeded those of New Orleans by from one-half to three-quarters of a cent per pound.

An investigation was also conducted into the prices of wheat in the larger Western Cities and comparison was made between the prices there and those in New York City. On the date named wheat was selling at Minneapolis for September delivery at 1.04⅜c. to 1.04⅞c. The bid in New York City was 1.15¼c., or a difference of about 11c. The freight rate from Minneapolis to New York was 14c. The price of wheat in Minneapolis was lower than in Chicago, Duluth, Kansas City, Toledo or Baltimore, but higher in New York City than in any of the other cities named.

The grades of flour for which quotations were investigated were " Pillsbury's Best " and " Gold Medal." New York was found to be 5c. per eighth barrel bag higher than Minneapolis, the freight from Minneapolis to New York being 5¾c.

The prices of No. 2 Yellow Spot Corn were examined in Chicago, Kansas City, New Orleans and New York. The Kansas City price was 79c., Chicago 81c., New Orleans 87c.,

and New York 89c. per bushel, the freight rate from Chicago to New York being from 8¼c. to 9¼c.

The investigation into the prices of No. 3 white oats, No. 2 rye and extra creamery butter also showed higher prices in New York City than in Western cities near the points of production.

In fact in the case of every staple investigated, it was found that prices near the source of production were less than the prices in New York City. If this statute is upheld, the Legislatures of Minnesota, Illinois and Kansas would be warranted in passing statutes providing that the paying systemmatically of less prices for their staples than for similar staples in other States would be *prima facie* proof of conspiracy.

The sugar of Louisiana all comes on the market about the same time and is pressed for sale because temporarily in excess of demand. Can any law expect the buyer to say to the seller under these circumstances: "You offer sugar to us at 4.90, and our competitors are buying from you at that price, but in New York it is quoted at 5.02 and we will pay you 5.02 in New Orleans?"

If a refiner does not buy in other markets than Louisiana, he need not comply with this law; he pays any price he pleases. If we have to obey the law and pay the New York price and the other refiner or planter does not, how can we compete?

Capital is free. We have no statutory immunity against competition in Louisiana. A new Company could build new refineries, and if it buy only in Louisiana, it can secure its raw material cheaper than we can, and the price of refined sugar is always based upon that of the raw.

We are obliged to do one of two things, either to conform all of our buying throughout the country, no matter how different the conditions and the offerings, to the prices at New Orleans, or we are obliged to pay in New Orleans an arbitrary

price, while our competitors, who do not buy in other states, buy freely at the natural market price.

This naturally leads us to our next point as to the inevitable inequality in the conditions of competition which the enforcement of the law would bring to pass.

FOURTH.

THE STATUTE, IN COMPELLING THE SUBJECTED REFINER TO PAY AN ARBITRARY PRICE FOR LOUISIANA SUGAR AND AT THE SAME TIME PERMITTING HIS COMPETITORS, THE EXEMPTED REFINERS, TO PURCHASE LOUISIANA SUGAR AT THE LOWEST MARKET PRICE, VIOLATES THE FOURTEENTH AMENDMENT IN DENYING THE COMPLAINANT THE EQUAL PROTECTION OF THE LAWS.

It is the vice of this Act that the exempted sugar refiner may buy his raw sugar at any price he pleases, having full freedom of access to the open markets where natural prices measure the composite mind of buyer and seller, while the subjected refiner is practically coerced into paying for his raw material the highest price then prevailing in any market of the country. This places him at an obvious and serious disadvantage.

The situation could not be better stated than in the opinion of the lower court :

> " That the statute in question is a case of arbitrary selection by those who are sought to be made the victims of the penalties it prescribed in the absence of any 'fair reason for the law that would not require with equal force its extension to others whom it leaves untouched '

we think is demonstrated by a statement of its methods of selecting those engaged in the sugar trade who are to be subject to its provisions and of distinguishing them from others engaged in the same business whom its leaves untouched. *A prime object of the statute*, plainly disclosed by its provisions, is to prevent a very limited class of persons or corporations engaged in the business of refining sugar in Louisiana from systematically paying in Louisiana a less price for sugar than they pay in other states, and to force them into the practice of paying as much for sugar bought by them in that state as they pay in any other state by subjecting their refineries to seizure and sale if they discontinue the purchase of sugar in Louisiana in the way contemplated by the act. * * * *This provision is the heart of the statute.* Other provisions are but means for enforcing the requirement of this one. If this provision is stricken out the statute is practically inoperative. * * * "We take it that a purpose of the statute was to prevent a practice resulting in the undue depreciation of the price of a commodity of the state. *But the statute undertakes to prevent such a practice only in the case of certain buyers, leaving beyond the reach of the prohibition other buyers whose practices may be identical and equally harmful in their tendencies.* A discrimination between two buyers of a commodity of a state which results in imputing criminality to the conduct of one of them in making his purchases if he owns property or carries on another business in the state while exactly the same conduct of another is left free of such an imputation, though he owns the same kind of property or is engaged in the same business, but not in the same place, is not based on any difference between the conduct of the one and that of the other. Those who are attempted to be subjected to the penal provisions of the act are determined by an arbitrary selection, wholly without regard to any difference between their delinquency and that of others whom the statute leaves untouched. This is such a denial of the equal protection of the law as renders the statute invalid and unenforceable."

The basic principle of our institutions is equality of opportunity. The very phrase "the common law" was explained by Lord COKE to mean "the law common to all." Indeed this concept of liberty is older than Anglo-Saxon law, and the power of the judiciary to nullify a law, which grossly violates the principle of equality or common justice, can be found in other civilized countries and even traced back to the Roman law in the time of the Empire.

In England, whatever may be the present theory as to the omnipotence of Parliament, it was the principle of the common law, as laid down by Lord COKE in Bonham's case (8 Coke Reports, 114) that the

> "common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is against *common right* and reason or impossible to be performed, common law will control it and adjudge such act to be void."

This doctrine had in subsequent cases the approval of three succeeding Lord Chief Justices (HOBART, HOLT and POPHAM) and was recognized as law in Bacon's Abridgement, Comyn's Digest and Vinar's Abridgement. Even the honeyed Toryism of Blackstone gave it some recognition in the immortal Commentaries.

So far as Anglo-Saxon jurisprudence is concerned the basic principle of equality under the law can be traced back at least to Magna Charta, for "the law of the land," later called "due process of law," (and in that verbal form made a part of our Constitution) had as its most substantial element the concept of equality.

The origin of the concept is only of academic interest, for the Fourteenth Amendment made it a constitutional principle in providing that the State could not deny to any citizen the "equal protection of the laws."

No application of this great principle is more important than

that the law shall not arbitrarily create inequality in commercial competition. It may not, without substantial reason, favor one man in commerce and handicap another. "A fair field and no favor" is the theory of competition and no form of inequality could work greater mischief than for a law to give to one class of competitors the fullest freedom in the purchase of raw material while handicapping another in this respect.

Counsel for appellant have freely admitted that this statute, while general in its terms, is yet aimed directly and deliberately at one corporation, the appellee. *Knowing that the appellee has refineries in many States and must purchase its raw material in many markets, the law deliberately seeks to compel the appellee to purchase the raw material for its Louisiana refinery at an artificial price, while permitting its competitors to purchase their raw material at the natural or market price.*

FIFTH.

THE STATUTE, IN SEEKING TO COMPEL THE SUBJECTED REFINER EITHER TO PAY AN ARBITRARY PRICE IN THE LOUISIANA MARKETS OR TO DESIST FROM THE PURCHASE OF SUGAR IN THE CHANNELS OF INTERSTATE AND FOREIGN COMMERCE, PLACES A BURDEN UPON THE RIGHT TO ENGAGE IN SUCH INTERSTATE AND FOREIGN COMMERCE.

The bill in equity shows that a very material part of the raw material for complainant's Louisiana refinery it imports from Cuba. It buys from Cuba and brings it here and refines it, and also buys at other ports. It is engaged in foreign commerce when it buy sugar in Cuba and bring it to New Orleans, and it is engaged in interstate commerce when it ships refined

product from New Orleans to many states of the Mississippi valley.

In the last four years it bought thirty-eight per cent. of its sugar in Louisiana in 1910; thirty-five per cent. the next year; twenty-five per cent. the next year, and only eighteen per cent. the next year. So that only eighteen per cent. was bought in the state of Louisiana and eighty-two per cent. elsewhere in 1913.

The chief evil that called the constitution of the United States into being is again illustrated by what is attempted by this statute. The fathers of the republic were familiar with restrictive trade statutes.

The situation is thus described by James Madison in his introduction to the Journal of the Federal Convention:

> "The same want of a general power over commerce led to an exercise of the power separately by the States, which not only proved abortive, but engendered rival, conflicting, and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighboring ports, and to coerce a relaxation of the British monopoly of the West Indian navigation, which was attempted by Virginia, the States having ports for foreign commerce, taxed and irritated adjoining States trading through them, as New York, Pennsylvania, Virginia, and South Carolina. Some of the States, as Connecticut, taxed imports from others, as from Massachusetts, which complained in a letter to the executive of Virginia, and doubtless to those of other States. In sundry instances, as of New York, New Jersey, Pennsylvania, and Maryland, the navigation laws treated the citizens of other States as aliens."

If the principle contended for by this legislation were carried to its logical conclusion, it is easy to see that the very system of conflicting and destructive commercial regulations, which the Constitution was intended to end, would be restored.

If Louisiana can under heavy penalties require a sugar refiner to buy raw sugar at an equal price with the highest price prevailing in any other market, then logically it could provide that such sugar refiner could be required to pay a greater price.

Carried to its logical extreme, Louisiana could in that event provide that a sugar refinery should not purchase any sugar except that of Louisiana production, and this would directly end all importations of raw sugar. If Louisiana could do this as to raw sugar, it could do so as to any other staple of commerce which it produced.

If Louisiana can pass such a regulation, then every State could pass a similar law with reference to its staples. It would thus follow that each State could require business enterprises within its limits to manufacture only with raw materials of its own production, and thus either such local business enterprises would be altogether destroyed or foreign or interstate commerce would be sensibly diminished.

Suppose New York should pass a retaliatory law, which should provide that no raw sugar should be purchased in that State except at a price which would be 10 per cent. in excess of the prevailing price in New Orleans? The Sugar Refiner, which, like the complainant, has refineries in both States, would be obliged either to violate the Louisiana or the New York law, and, if all the States made similar attempts with reference to their staples to obtain a higher price, the same commercial anarchy would result as prevailed prior to the adoption of the Constitution.

It was mainly the intolerable mischief of such restrictive regulations that brought about the Constitutional Convention of 1787, and while its members disagreed upon many other powers, upon one question they were at all times unanimous and that was that this system of conflicting commercial regulation must end and that between the States of the Federal Union there should be perpetual freedom of

trade. To accomplish this, they delegated to the Federal Government a permanent and plenary power to prevent any interference with foreign or domestic commerce.

It is not necessary to cite any of the many cases decided by this Court which have sustained this paramount power. It has been held that even in the exercise of the highest of all governmental powers, that of taxation, the State may not, under the guise of a license tax, whether large or small,

> "impose any burdens upon such commerce (interstate commerce) within its limits".
>
> Norfolk & Western R. R. Co. vs. Pennsylvania, 136 U. S., 114.

It has been repeatedly held that a state cannot discriminate against citizens or products of other States.

Railroad v. Husen, 95 U. S., 465;
Minnesota v. Barber, 136 U. S., 313;
Brimmer v. Rebman, 138 U. S., 78;
Voight v. Wright, 141 U. S., 62;
Tiernan v. Rinker, 102 U. S., 123;
Guy v. Baltimore, 100 U. S., 434;
Welton v. Missouri, 91 U. S., 275.
Walling v. Michigan, 116 U. S., 446.

Nor impose a license fee on the privilege or occupation of engaging in interstate commerce.

Robbins v. Shelby Co., 120 U. S., 489;
Corson v. Maryland, 120 U. S., 502;
Leloup v. Mobile, 127 U. S., 640;
Harmon v. Chicago, 147 U. S., 396;
Brennan v. Titusville, 153 U. S., 289;
Moran v. New Orleans, 112 U. S., 69;
Asher v. Texas, 128 U. S., 129;
McCall v. California, 136 U. S., 104;
N. & W. R. Co. v. Pa., 136 U. S., 114;
Crutcher v. Ky., 141 U. S., 47;
Henderson v. Mayor, 92 U. S., 259;
Pickard v. Pullman Co., 117 U. S., 34;
Webber v. Va., 103 U. S., 344;
Stoutenburgh v. Hennick, 129 U. S., 141.

Nor can a State in any way attempt to regulate interstate commerce by imposing burdensome conditions under which it may be conducted, whether by fixing rates;

Wabash R. Co. v. Illinois, 118 U. S., 557;
Covington Bridge Co. v. Ky., 154 U. S., 204.

Or by preventing the introduction of certain articles of commerce.

Bowman v. Chicago Ry. Co., 125 U. S., 465;
Leisy v. Hardin, 135 U. S., 100.

Are all these forms of discriminatory legislation invalid, but may the State accomplish the same end by a still more offensive discrimination, which also offends the great and salutary principle of the Fourteenth Amendment as to the equal protection of the law?

The interference would be direct and substantial, for certainly if the purchaser of such sugars must, by reason of the coercion of the presumption, be guided by the price which he pays in other markets and not by the value of the sugar in Louisiana at the time of purchase, this fear of being subjected to the presumption has a very practical and immediate effect upon his liberty to engage freely in interstate and foreign commerce in sugar. He is restricted necessarily to one of several courses. Either he must arbitrarily pay systematically in Louisiana the highest price being paid by him in any other market of the country,—without regard to the many varying trade conditions due to the workings of familiar economic laws, which we have already detailed,—or he must desist from buying sugars in interstate and foreign commerce.

SIXTH.

THE STATUTE CREATES THE OFFICE OF "STATE INSPECTOR OF SUGAR REFINING" AND DESIGNATES AN EXISTING OFFICER, THE "SUPERVISOR OF PUBLIC ACCOUNTS FOR THE STATE OF LOUISIANA" AS, EX-OFFICIO, "STATE INSPECTOR OF SUGAR REFINING," AND THEREBY VIOLATES ART. 170 OF THE LOUISIANA CONSTITUTION, WHICH PROHIBITS DUAL OFFICE-HOLDING.

I.

THE ACT CREATES THE NEW AND DISTINCT OFFICE OF "STATE INSPECTOR OF SUGAR REFINING."

It is only necessary to refer to the Act itself for proof that it creates an office. It is so expressed in terms.

The title of the Act is, in part:

> "An Act regulating the business of refining sugar, * * * creating the office of State Inspector of Sugar Refining, and such assistants as may be necessary, and providing that the Supervisor of Public Accounts of Louisiana shall be an ex-officio State Inspector of Sugar Refining and for his salary, duties, and those of his assistants;" * * *

Section 2 of the Act reads as follows:

> "That the office of State Inspector of Sugar Refining is hereby created, and the Supervisor of Public Accounts for the State of Louisiana is hereby made *ex-officio* State Inspector of Sugar Refining."

II.

THE ACT THUS MAKES AN EXISTING OFFICER, VIZ., THE "SUPERVISOR OF PUBLIC ACCOUNTS FOR THE STATE OF LOUISIANA," A DUAL OFFICE-HOLDER.

Louisiana Act No. 25 of 1910 is entitled, "An Act to create the office of Supervisor of Public Accounts for the State of Louisiana; * * *" The Act provides for the appointment of the officer by the Governor and fixes his duties, compensation, etc.

It is clear, then, that Act No. 10 of 1915, E. S., which creates a distinct office and designates an existing officer (Act No. 25 of 1910) to fill the new office thus created, makes of the existing officer a dual office-holder.

III.

ARTICLE 170 OF THE LOUISIANA CONSTITUTION FORBIDS DUAL OFFICE-HOLDING.

Article 170 of the Constitution of Louisiana provides:

> "No person shall hold or exercise, at the same time, more than one office of trust or profit, except that of Justice of the Peace or Notary Public."

This provision is plain and self-operative in its prohibition. It has been accepted by the Supreme Court of Louisiana as meaning literally what it says. It is patent that, under its terms, dual office-holding is impossible.

The judicial construction of the constitutional prohibition is that the first office is *ipso facto* vacated by qualifying for the second, and this judicial construction has been since embodied in Act No. 13 of 1912.

Thus in *State vs. Newhouse*, 29 La. Annual 824, where one

Lewis, while holding the position of jury Commissioner, under appointment of the Governor, was appointed to, and accepted the office of police commissioner, the Court held that, by accepting and entering upon the duties of the office of police commissioner, Lewis ceased to be a jury commissioner and that the office became absolutely vacant.

To like effect are:

State vs. Arata, 32 La. An., 193.
State vs. Fuselier, 51 La. An., 1317, 1319.
State vs. Scott, 110 La., 369, and
State vs. Bain, 135 La., 776 (66 So. Rep., 196).

It may not, therefore, be controverted that the Constitution not only forbids dual office-holding, but that the inevitable effect of accepting a second office is, *ipso facto*, to vacate the first.

IV.

Act No. 10 violates Article 170 of the Louisiana Constitution and is null and void.

We have assumed that it has been seen and accepted that the two offices—"State Inspector of Sugar Refining" and "Supervisor of Public Accounts for the Sale of Louisiana"—are both offices of "trust or profit," as the Acts creating the respective offices fix in terms the duties and compensation of the officers respectively

It cannot be contended that the office of "State Inspector of Sugar Refining" is any the less an office merely because the Legislature has designated the person who is to administer the office. The fact that the Legislature has designated to fill the office an existing office-holder who is incapable of holding the office, does not in any degree change the fact that a new office has been created, but merely affects the ability of the designated person to hold the newly created office.

If the Act had provided that the Governor should appoint the Inspector of Sugar Refining, and if the Governor had appointed the person who happened to be the Supervisor of Public Accounts, such appointee could indeed have qualified as Inspector, but he would thereby have at once vacated the office of Supervisor; however, under the Act as framed, the Supervisor cannot qualify as Inspector, for the reason that the office of Inspector must be held by the Supervisor, and the moment the Supervisor qualifies as Inspector, he ceases to be Supervisor. Yet it is plain that in both cases the office of Inspector remains the same. So the mere designation by the Legislature of the Supervisor of Public Accounts as the one to fill the office, in no degree affects the quality of the office of Inspector as an office. If it be an office when the Governor appoints the office-holder, as must be admitted, it is an office when the Legislature designates the office-holder.

Nor can this result be avoided by suggesting that Act No. 10 merely imposes additional duties upon an existing officer, for, as we have shown, the Act "creates" the office; and the Act is one purporting to regulate the sugar refining business, making special rules as to the purchase of sugar by refiners, compelling reports by sugar refiners, imposing a special tax upon sugar refiners, etc., and not purporting, either by its title or in its body, to be an amendment of the Supervisor Act. It is sufficient to say, therefore, that Act No. 10 does not purport to be an amendment, but it may be added that the provisions of Act No. 10 are not germane to the Act creating the Supervisor's office and clearly would not have been valid as an amendment thereof.

Nor can it be successfully contended that the designation by the Legislature of an existing officer, *ex-officio*, to hold the newly created office of Inspector of Sugar Refining, renders the new office any the less a distinct office. The Act in terms calls it an office; it "creates" the office as a distinct office; and an office is an office without regard to who fills it, whether

by virtue of holding another office or by original appointment election or selection in any other manner.

The Supreme Court of Louisiana has passed upon this very question. In the case of *Bouanchaud vs. D'Hebert*, 21 An. 139, the Court said:

> "Article 117 of the Constitution declares that 'No person shall hold or exercise, at the same time, more than one office of trust or profit, except that of justice of the peace or notary public.'
>
> "The fourth section of the act, approved September 4, 1868, provides 'That the clerks of the several District Courts shall be *ex-officio* clerks of the Parish Courts, and that the clerk or his regularly appointed and qualified deputy, shall always be in attendance on the Parish Court at all its terms and sittings.' It also prescribes certain duties to the clerks and imposes a fine for failure to perform those duties.
>
> "We think this section clearly creates the office of Parish Clerk, and the words '*ex-officio*' do not make it the less an office of trust. It is a separate office, and the designation of the District Clerk to fill it, is contrary to Article 117 of the Constitution, and is, therefore, null and void."

Finally, it is patent upon the face of the Act that, if there can be no Inspector of Sugar Refining, the Act itself must fall as a whole, for there would then be no way in which the provisions of the Act could be carried out.

If there be no Inspector, there will be no one to whom the reports required by Section 3 can be made; no one to make the inspection of books and records required by Section 4; no one to whom the monthly payments of inspection taxes may be made as required by Section 5; and, finally and conclusively, no one who can formulate and promulgate the regulations provided for and required to be made by Section 6, and without which the entire Act is incomplete and inoperative.

SEVENTH.

THE STATUTE DIRECTS THE INSPECTOR OF SUGAR REFINING TO FORMULATE REGULATIONS, WHICH ARE TO BE GIVEN THE FORCE AND EFFECT OF LAW, AND THEREIN VIOLATES ARTICLE 21 OF THE LOUISIANA CONSTITUTION, WHICH PROVIDES THAT THE LEGISLATIVE POWER SHALL BE VESTED EXCLUSIVELY IN THE GENERAL ASSEMBLY.

I.

THE ACT DIRECTS THE INSPECTOR OF SUGAR REFINING TO MAKE REGULATIONS.

In suport hereof it is enough to consider the literal terms of the Act. Section 6 provides (Record, p. 20):

> "That it is declared to be unlawful for any person engaged in the business of refining sugar to buy sugar on an *ex parte* test of its quality, or upon any other weights than those of the actual net contents of any bag or package; and, in furtherance of this prohibition, the State Inspector of Sugar Refining is empowered and he is hereby directed to formulate, and to promulgate, by publication in three consecutive editions of a newspaper published in the City of New Orleans, such reasonable regulations as he may deem proper, and he may, also, formulate and promulgate, from time to time, in the same way, such other reasonable regulations, affecting any branch of the business of sugar refining, as may be conducive to the public interest, and to the prevention of monopoly in the business of refining sugar, or the protection of the public from the consequences thereof."

It will be observed, in passing, that the Inspector is directed to formulate some regulations at once, and is au-

thorized to make others from time to time. This direction clearly indicates that, in legislative contemplation, the Act is incomplete and inoperative without some regulations, a fact which is conclusively shown by a consideration of other provisions, particularly those of the same Section 6, which forbid a refiner " to buy sugar on an *ex parte* test of its quality, or upon any other weights than those of the actual net contents of any bag or package," and of Section 7, which prescribe drastic penalties if any refiner shall violate the indefinitely prescribed " obligation to operate any refinery as a public utility." This is palpably true, since otherwise the refiner is furnished with no standard of conduct to which to conform so as to escape the multiple and excessive penalties of the Act.

II.

THE MAKING OF REGULATIONS IS A LEGISLATIVE FUNCTION AND ITS DELEGATION TO ADMINISTRATIVE BODIES OR OFFICERS IS EXPRESSLY FORBIDDEN BY ART. 21 OF THE CONSTITUTION OF LOUISIANA.

One to whom is delegated the power and authority to make rules of conduct for others is unquestionably invested with legislative powers ; and this is accentuated in the instant case by the provision of the Act, which inflicts the same penalties for the violation of any one of the regulations of the Inspector as for the violation of any substantive rule of conduct prescribed by the Act itself. Section 10 reads in part :

> " That the violation of any of the provisions of this Act, not otherwise provided for, or of any of the regulations promulgated by the State Inspector of Sugar Refining shall be punished by a fine of not less than fifty dollars and not more than twenty-five hundred dollars. Each day's violation of this Act shall constitute a separate offense."

Article 21 of the Louisiana Constitution reads :

> " The legislative power of the State shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

The exclusiveness of this power is accentuated by two other Articles of the Constitution, viz. :

> " ART. 16. The powers of the government of the State of Louisiana shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit : Those which are legislative to one, those which are executive to another, and those which are judicial to another."

> " ART. 17. No one of these departments, nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

These Articles 16 and 17 leave no room for doubt that it is the deliberate purpose of the Constitution that those of one department of the government shall not exercise any of the powers of the other two departments, and constrain the strictest construction of Article 21.

Whatever may be the disposition in other States and in federal legislation to recognize to some extent the delegation of essentially legislative duties to administrative bodies, yet the Constitution and jurisprudence of Louisiana forbids such delegation.

It is sufficient to refer to the Louisiana case of *State vs. Snyder*, 131 La., 145. In that case Snyder contested the legality of a provision of a Sanitary Code enacted by the State Board of Health, upon the claim that the enactment of the Sanitary Code by the Board of Health involved a legislative function in violation of the Constitution. While the

Court rejected the defendant's contention, it did so specifically upon the ground that the Constitution itself, by a special Article, authorized the Legislature to delegate the power to the Board of Health; but conceded that, in the absence of this special constitutional authority, the Legislature could not have made the delegation of power. The Court said:

> "He (the defendant) challenges the constitutionality of said provision on the ground that the Legislature could not validly delegate to the State Board of Health the power to declare and provide what conduct shall constitute a crime, that the power by which conduct otherwise innocent is made criminal is legislative, and that legislative power for state purposes can be validly exercised only by the Legislature itself, and cannot be constitutionally delegated to some subordinate functionary.
>
> The contention would be well founded if it were not for article 296 of the Constitution, reading:
>
> > 'The General Assembly shall create for the state, and for each parish and municipality therein, boards of health, and shall define their duties, and prescribe the powers thereof.'"

The Inspector of Sugar Refining is an administrative officer and forms part of the Executive department, hence he may only execute laws made by the legislative department.

The *Snyder case*, 131 La., 145, above cited, directly supports this view. The Court there say in terms that the delegation by the Legislature to the Board of Health of the power to make health regulations and laws would have been in conflict with the general prohibition of the Constitution against declaring the legislative power—as necessarily implied from the above quoted Articles—and was justified only by the authority of the Constitution itself as the Court found it to be expressed in Article 296 with reference to the Board of Health.

Furthermore, Article 33 of the Louisiana Constitution reads :

> " The General Assembly shall never adopt any system or code of laws by general reference to such system or code of laws ; but in all cases shall recite at length the several provisions of the laws it may enact."

If the Legislature itself cannot adopt a system or code of laws with the provisions of which it is familiar, and of which it approves, but must " recite at length the several provisions of the laws it may enact," how much the less can it delegate to another the power to enact laws according to that other's judgment and will—laws of which the Legislature must necessarily be ignorant, and the terms of which neither it nor anyone can possibly predict or forecast.

EIGHTH.

LOUISIANA ACT NO. 10 OF 1915, E. S., PROVIDES FOR THE APPOINTMENT OF AN OPERATING RECEIVER UNDER CERTAIN CONDITIONS, TO THE PROPERTY OF A SUGAR REFINER SUBJECT TO ITS TERMS, WHEN MADE DEFENDANT IN A SUIT UNDER THE ACT, AND THEREIN DEPRIVES SUCH DEFENDANT OF PROPERTY WITHOUT DUE PROCESS AND DENIES THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The Act provides for the appointment of an operating Receiver, *pendente lite* under certain conditions, and the

Receivership so provided for constitutes an unreasonable taking of property and a denial of the equal protection of the laws, and violates the Fourteenth Amendment.

Section 7 of the Act reads :

> " That any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other State shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of five hundred dollars a day for the period during which he is adjudged to have done so. Any person convicted of violating the provisions of this section shall have his license to do business in Louisiana revoked and canceled ; and any domestic corporation shall be liquidated, and any foreign corporation shall be ousted from the State, and its property sold. If the refining business of any person, firm or corporation, is conducted in violation of this provision of this Act, or in violation of the obligation to operate any refinery as a public utility, the Court may if irreparable injury to the public interest is shown, *appoint a receiver over such business* at any stage of the proceedings, and the receiver may after he has been sworn and has given bond in such amount as the Court shall have fixed *be authorized to carry on the business*, if the public interest requires it, until the termination of the suit." (Italics ours.)

Section 9 reads in part :

> " That any person, firm or corporation owning or operating a refinery who is charged with violating this law, and shall be made defendant in a suit by the State for forfeiture of charter, or for cancellation of license to do business in the State, and for ouster therefrom, may, upon showing by the State that the conspiracy, monopoly, or acts charged are detrimental to the general public welfare, be ruled into court, at any stage of the proceedings, *to show cause why* an

injunction should not issue, or *a receiver be ordered to take charge of the defendant's business, with power to operate* after having been sworn and given bond as fixed by the Court." (Italics ours.)

The turning over of the property and assets of a defendant refiner to a Receiver is obviously a taking of property. The possession of the property is changed, and the possession of property is property ; possession and right of use are among the most valuable and beneficial elements of ownership.

But here the owner is not merely dispossessed of his refinery, stock, money, etc., he is also subjected to the perhaps ruinous operation of his business by another at his expense and forced to accept the will, judgment and capacity of another in the conduct of a most complex commercial and manufacturing business, in which experience and judgment are all essential as to buying, selling, manufacturing, prices to be paid and asked, credits and the numberless other details which spell the difference between loss and profit.

Is such a taking of property unreasonable?

Let us first examine the provisions of the Act to find what is designed to be ultimately accomplished by a suit based on its violation, in which alone a Receiver *pendente lite* may be appointed. The very terms of the Sections quoted show that the ultimate purpose of such a suit as may be brought is to accomplish the total cessation of the defendant's business. It is patent, therefore, that the Act admits that the State, the only possible plaintiff in such a suit, has no interest in the continued operation of the defendant's business.

But, even assuming for the sake of the argument, that the Act be held to assert that the State has an interest in the continued operation of a defendant's business after judgment of dissolution or ouster, on what theory could such asserted interest be justified? Plainly only on the ground of public interest.

We have, we trust, shown that the business of sugar refining is not affected with a public interest and that sugar refineries are not public utilities, since the business is not affected with a public interest; and hence that the business is purely private and that the State has no interest therein. How then can a Receivership over a private business be justified at the instance of the State in the public interest? It is elementary that a Receivership can be granted over a private business only at the instance of some one having a property interest—stockholders or creditors.

Even if it were to be conceded for the argument that the business of sugar refining is affected with a public interest, yet there would be no justification for the State to compel the operation of such business. For, in any event, the public control may lawfully be imposed only to the extent of the interest which the owner has created; yet a receivership under the Act would wholly displace the owner and cover the entire business, which it is not conceivable the public interest could require.

Furthermore, there is no obligation upon an owner to continue the operation of a business affected with a public interest. As long as he conducts such business, he must submit to a reasonable public control, under the limitations just above stated, but he may withdraw at pleasure. As said by Chief Justice WAITE in the *Munn case*, 94 U. S., 126:

> "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use;* but, so long as he maintains the use, he must submit to the control." (Italics ours.)

Even if it were conceded, *arguendo*, that sugar refineries are not merely affected with a public interest, but are public utili-

ties, the same rule applies: The public control extends only to the matters affecting the obligations to the public of the public utility. For instance, railroads must submit to reasonable public control with regard to rates, train service, contracts for carriage, etc,—in short, with reference to all their obligations to the public—but they may not be so controlled with reference to those matters which are as private with them as they are with wholly private enterprises. Instances could be multiplied—gas, electric light, telephone, telegraph, etc.

This Court only recently said:

> "A railroad company's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs." *Great Northern Ry. Co. vs. Minnesota Railroad Commission*, 238 U. S., 340.

It follows, therefore, that, even if there be a public interest warranting interference, a receivership is not a reasonable or appropriate remedy, because it necessarily divests many of the rights of the owner which are in no way illegally exercised and which the public has no interest whatever in controlling or divesting. To allow such a receivership would be to force the owner to operate against his will and judgment, and thus appropriate to the public use property and rights which he has the undoubted right to put to any lawful use he will.

It is plain that, if violation or violations of the law be charged against a sugar refiner, the continuance of the illegal acts or conduct may be fully and completely suspended, *pendente lite*, by an injunction. To grant a Receivership for such a cause would be as if the law should provide that a department store violating a law regarding, say, the employment of minors, should be thrown into the hands of a receiver pending the trial of the suit.

Section 9 makes it plain that it is solely the prevention of

the doing of one or more of the prohibited things which constitute the public interest, and upon which the Receivership is based. It is patent that, the violation of the law ceasing, the public interest (if one existed) must, *ipso facto*, cease; yet the prevention of the continuance of the violation of the law in one or more particulars may be fully accomplished by an injunction. For the State to deny the effectiveness of an injunction in such case would be to deny the ability of its courts to enforce the injunction, which would be to deny its own sovereignty.

The business of sugar refining is a lawful business and the owner of such a business has a constitutional right to lawfully conduct such business. A receivership, which would deny him this right, upon the excuse of stopping him from the violation of some obligation which he owes to the public, would clearly work an unreasonable taking of property.

And when it is considered that the business is in fact private, and that the owner may operate or not as he will, there can be no shadow of plausible defense for such an unusual and unnecessary invasion of the owner's dominion over his property.

Conclusion.

We submit that Louisiana Act No. 10 of 1915, E. S., violates the Constitutions of the United States and of the State of Louisiana upon all the grounds of the Bill urged herein and is therefore null and void; and that complainant was entitled to the temporary injunction, *pendente lite*, granted by the decree of the District Court against the defendants, enjoining and restraining them, and each of them, from enforcing, or attempting to enforce, against complainant the provisions of said Act

and any and all regulations made, or which shall be made, thereunder; and that the decree appealed from should be affirmed.

Respectfully submitted,

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